

IN THE SUPREME COURT OF THE UNITED STATES

Pages: 1 through 92  
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1           IN THE SUPREME COURT OF THE UNITED STATES  
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3   MARIETTA MEMORIAL HOSPITAL                    )  
4   EMPLOYEE HEALTH BENEFIT PLAN,                )  
5   ET AL.,    )  
6                                    Petitioners,                )  
7                                    v.                        ) No. 20-1641  
8   DAVITA INC., ET AL.,                                )  
9                                    Respondents.                )  
10  - - - - -

11  
12                                    Washington, D.C.  
13                                    Tuesday, March 1, 2022  
14

15           The above-entitled matter came on for  
16   oral argument before the Supreme Court of the  
17   United States at 11:38 a.m.  
18  
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25

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3 of the Petitioners.

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6 United States, as amicus curiae, supporting  
7 reversal.

8 SETH P. WAXMAN, ESQUIRE, Washington, D.C.; on behalf  
9 of the Respondents.

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1 P R O C E E D I N G S

2 (11:38 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear  
4 argument next in Case 20-1641, Marietta Memorial  
5 Hospital Employee Health Benefit Plan versus  
6 DaVita, Incorporated.

7 Mr. Kulewicz.

8 ORAL ARGUMENT OF JOHN J. KULEWICZ

9 ON BEHALF OF THE PETITIONERS

10 MR. KULEWICZ: Mr. Chief Justice, and  
11 may it please the Court:

12 For four decades, the Medicare  
13 Secondary Payer Act has been a coordination of  
14 benefits statute. It establishes that a group  
15 health plan must pay its benefits first during a  
16 30-month coordination period when the plan and  
17 Medicare both cover an individual who must  
18 contend with end-stage renal disease.

19 The plan must not take into account  
20 the Medicare entitlement or eligibility of an  
21 individual during that time or differentiate in  
22 the benefits that it provides between  
23 individuals with end-stage renal disease and  
24 other individuals covered by the plan on a basis  
25 that relates to that diagnosis.

1           The Sixth Circuit has determined that  
2       there also is an implied mandate that dialysis  
3       providers occupy a specific position to be  
4       determined relative to providers who serve other  
5       vital healthcare needs of the 157 million  
6       American people who depend upon group health  
7       plans to defray the costs of their healthcare.

8           When Congress requires a specific  
9       benefit or parity between benefits, it does so  
10      directly. It did not do that here. The  
11      Medicare Secondary Payer Act coordinates  
12      benefits. It does not prescribe them. The plan  
13      at issue in this case provides the same benefits  
14      uniformly to all participants and as primary  
15      payer during the 30-month coordination period.

16           Respondents fail to state a claim  
17      under the Medicare Secondary Payer Act. Because  
18      the alleged violations of the Medicare Secondary  
19      Payer Act are the express and only basis of  
20      their ERISA claims, Respondents also fail to  
21      state a claim under ERISA.

22           The Court should reverse the Sixth  
23      Circuit and enter final judgment in favor of  
24      Petitioners on all remaining claims.

25           I welcome the questions of the Court.

1 JUSTICE THOMAS: Doesn't your approach  
2 permit the differentiation or some  
3 differentiation between sort of high-cost  
4 services that are used by a certain segment of  
5 the population? I think that's the argument  
6 here, that you have a lot of people who are not  
7 in a good position to pay who are being charged  
8 an amount that -- they're high usage, they're  
9 poor, and they can't pay the costs, and it seems  
10 as though your approach target that group.

11 MR. KULEWICZ: Your Honor, the -- the  
12 approach that this plan takes is actually to  
13 minimize the actual out-of-pocket payment that  
14 the participants in any situation who are  
15 receiving dialysis will make.

16 What this plan does by -- by tying the  
17 benefit -- by making the allowable charge the  
18 Medicare base rate and paying at 125 percent of  
19 that, that means that the plan pays 70 percent  
20 and the individual pays 30 percent.

21 So paying --

22 JUSTICE THOMAS: So what's the  
23 disagreement? The Respondent does not agree  
24 with that assessment --

25 MR. KULEWICZ: That's --

1 JUSTICE THOMAS: -- of your approach.

2 MR. KULEWICZ: Yes, Your Honor, that's  
3 correct. The -- what the Respondent seeks, in  
4 paragraph 67 of its complaint and amended  
5 complaint on pages 32 and 322 of the respective  
6 appendices, is -- is that they have a right to  
7 be paid under the Medicare Secondary Payer Act  
8 their full undiscounted charges because that is  
9 the only way to eliminate the -- the specter  
10 that they hang out there of balance billing.

11 But what that would mean for the  
12 participant is a participant who's been paying  
13 30 percent of 125 percent of the Medicare rate,  
14 which is \$257 this year, so the participant will  
15 be paying roughly \$96 per treatment, but, if the  
16 Court grants the relief ultimately that DaVita  
17 seeks, that same individual will be paying  
18 30 percent of -- according to the Pacific Health  
19 Coalition amicus brief, the dialysis charges  
20 range from \$1,041 to \$6,000 per treatment. So  
21 that same participant, instead of paying \$96 per  
22 treatment, would be paying up to -- up to \$1800  
23 per treatment.

24 JUSTICE THOMAS: Thank you.

25 MR. KULEWICZ: Thank you, Your Honor.



1 JUSTICE BREYER: Just a factual  
2 question. Is Marietta Memorial Hospital one  
3 hospital, like one big set of buildings?

4 MR. KULEWICZ: Yes, Your Honor, it is  
5 a -- a --

6 JUSTICE BREYER: Just one. So Tier I  
7 applies to people who go to that set of  
8 buildings?

9 MR. KULEWICZ: That's right. The --

10 JUSTICE BREYER: And does that set of  
11 buildings, or Marietta Memorial, provide the  
12 service of outpatient dialysis?

13 MR. KULEWICZ: No, it does not,  
14 Justice Breyer. There are -- there are --

15 JUSTICE BREYER: There is -- you know,  
16 it says an exception in the thing where it  
17 says --

18 MR. KULEWICZ: Right.

19 JUSTICE BREYER: -- Tier II will --  
20 we'll charge -- we'll charge Tier II even if you  
21 get outpatient dialysis in the Marietta  
22 Hospital, but there -- that exception has no  
23 application, I take it?

24 MR. KULEWICZ: Well, if -- if a  
25 patient with ESRD is hospitalized for some

1 reason --

2 JUSTICE BREYER: Yeah.

3 MR. KULEWICZ: -- and receives  
4 dialysis at the hospital, at a Marietta --

5 JUSTICE BREYER: But that's inpatient.

6 MR. KULEWICZ: That's inpatient.

7 That's reimbursed at the -- at the Tier I rate,  
8 Your Honor. Yes.

9 JUSTICE BREYER: That's reimbursed at  
10 the Tier I rate. So --

11 MR. KULEWICZ: If the --

12 JUSTICE BREYER: -- so the Tier II  
13 rate, right now, anybody, okay, good. I'll ask  
14 the other side.

15 MR. KULEWICZ: Thank you, Your Honor.

16 JUSTICE SOTOMAYOR: Counsel, does this  
17 plan as designed encourage people to get on  
18 Medicare?

19 MR. KULEWICZ: Your Honor, this plan  
20 is decision neutral as -- as it pertains to --

21 JUSTICE SOTOMAYOR: Well, it's not  
22 really decision neutral. Those people who don't  
23 have Medicare can be balance billed, correct?  
24 And so they really aren't encouraged, I put the  
25 words, to join Medicare?

1           MR. KULEWICZ: Yeah. If they join --  
2     if they enroll in Medicare for -- for Part B,  
3     Your Honor, there is -- there is a prohibition  
4     against balance billing. But --

5           JUSTICE SOTOMAYOR: Right. So, if  
6     they're not, then you can balance bill?

7           MR. KULEWICZ: That's for an  
8     individual --

9           JUSTICE SOTOMAYOR: So the --

10          MR. KULEWICZ: -- who's just covered  
11     by --

12          JUSTICE SOTOMAYOR: I -- I ask that  
13     question only because it's a very complex area.  
14     You're going against the Medicare purpose of  
15     ensuring that the public fisc is not dipped into  
16     until necessary, but this process is forcing  
17     those non-Medicare people to jump into Medicare  
18     as soon as they can.

19          MR. KULEWICZ: Well, Your Honor, CMS  
20     itself unequivocally encourages people in this  
21     sort of a situation to enroll in Medicare for --  
22     for the reasons that Your Honor has pointed out.

23          And -- and, secondly, the Medicare  
24     Secondary Payer Act, by definition, contemplates  
25     that -- that plans will pay a rate that -- plans

1 may pay a rate below the Medicare base rate  
2 and --

3 JUSTICE SOTOMAYOR: Now there is one  
4 big difference in benefits here, and for me, it  
5 is -- it seems like the Tier I/Tier II -- and I  
6 could be wrong, you can correct me -- for  
7 everything else besides this condition says that  
8 it will pay a certain percentage of the  
9 reasonable and necessary costs of the service.

10 Am I correct?

11 MR. KULEWICZ: Well, Your Honor,  
12 technically, the plan says it will pay a  
13 reasonable -- reimburse at the reasonable and  
14 necessary cost of all services. It's just, with  
15 respect to Medicare and 10 other services, by  
16 the way, there are -- there are reference-based  
17 prices.

18 JUSTICE SOTOMAYOR: So why isn't the  
19 fact that this is a differentiation of the  
20 general standard of paying benefits -- the  
21 general standard is a percentage of the  
22 reasonable and necessary costs, but, with  
23 respect to ESRD, you limit it to a cap.

24 MR. KULEWICZ: We pay the --

25 JUSTICE SOTOMAYOR: Why isn't that cap

1       --

2               MR. KULEWICZ:  We pay the same --

3               JUSTICE SOTOMAYOR:  -- back at --

4               MR. KULEWICZ:  I'm sorry, Your Honor.

5               JUSTICE SOTOMAYOR:  Yes.

6               MR. KULEWICZ:  We pay the same  
7       percentage of reimbursement for Tier II -- for  
8       Tier II, it is treated as a virtual Tier II  
9       benefit.  The only difference is that rather  
10      than accept what the Respondents say is a  
11      reasonable and customary rate because they are  
12      operating in a dysfunctional monopolistic  
13      market, so we -- we base the reimbursement on  
14      the Medicare rate.

15              JUSTICE SOTOMAYOR:  But that's still a  
16      different way --

17              MR. KULEWICZ:  Well --

18              JUSTICE SOTOMAYOR:  -- of treating  
19      people.  So why isn't that on the face of the  
20      statute --

21              MR. KULEWICZ:  Your Honor --

22              JUSTICE SOTOMAYOR:  -- not legal?

23              MR. KULEWICZ:  -- because every --  
24      every -- what the statute -- what the Medicare  
25      Secondary Payer Act requires is that a plan not

1 differentiate in the benefits that it provides  
2 between individuals with end-stage renal disease  
3 and others covered by the plan.

4 The -- the benefits here are -- the  
5 dialysis benefits are available to every  
6 individual covered by the plan for any -- for  
7 any purpose.

8 JUSTICE KAGAN: Can I -- can I ask  
9 you, I mean, maybe just state the question at a  
10 completely abstract level first. If there's a  
11 law that says you can't differentiate between  
12 Group X and Group Y, right, and you don't  
13 differentiate quite between Group X and Group Y,  
14 you just find a perfect proxy, a perfect proxy  
15 that ends up distinguishing between Group X and  
16 Group Y. So you change the words, but a hundred  
17 percent of the people with this proxy  
18 characteristic are Group X, and a hundred  
19 percent of the people with this proxy  
20 characteristic are Group Y.

21 Are you in violation of the  
22 differentiation provision or not?

23 MR. KULEWICZ: What you would do in  
24 that situation, Your Honor, under the auspices  
25 of the Medicare Secondary Payer Act, is you

1 would look at the -- at the first group in Your  
2 Honor's hypothesis. If -- if they all are --  
3 and bearing in mind this statute says  
4 individuals with end-stage renal disease.

5 If -- if that is -- if that is a -- a  
6 common denominator among that class, then you go  
7 to the next element of the statute. Is that  
8 differentiation on -- on account of the  
9 existence of end-stage renal disease? Is it on  
10 account of that individual's need for renal  
11 dialysis as opposed to the other treatment  
12 there?

13 JUSTICE KAGAN: I guess I'm not really  
14 quite understanding what you're getting at, so  
15 now we'll just go to the case. I mean, let's --  
16 I mean, it doesn't take much of a change in the  
17 numbers to be a perfect proxy.

18 I mean, these are like 99 percent to  
19 97 percent. But let's say you had a hundred  
20 percent and a hundred percent, meaning that a  
21 hundred percent of people with end-stage renal  
22 disease need dialysis and a hundred percent of  
23 the people who need outpatient dialysis have end  
24 -- end-stage renal disease.

25 Suppose it were a hundred percent, a

1     hundred percent, as opposed to what it is, which  
2     is 99.5 percent and 97 percent, all right, but  
3     let's just -- let's -- let's just round up and  
4     say it's a hundred.

5                 Now, when you differentiate between  
6     people on the basis of end-stage renal disease,  
7     you say, well, we can't do that, we'll just  
8     differentiate on the basis of the treatment that  
9     they all need and that only they need.

10                MR. KULEWICZ: That would be a -- a  
11     different situation, of course. And proximity  
12     makes per --

13                JUSTICE KAGAN: Well, in -- in that --  
14     before you tell me why it's different, in that  
15     situation, have you violated the provision?

16                MR. KULEWICZ: If there was -- Your  
17     Honor, if there was a hundred percent complete  
18     identical overlap, then -- then we are back in  
19     the situation that the statute proscribes. So  
20     -- so then -- then you would ask --

21                JUSTICE KAGAN: Back in the situation  
22     that the statute proscribes, prohibits.

23                MR. KULEWICZ: Well, there --

24                JUSTICE KAGAN: You would be in  
25     violation of the statute, is that what you're



1 saying?

2 MR. KULEWICZ: Well, if -- if --

3 JUSTICE KAGAN: I'm just asking. I'm  
4 just trying to get it clear. If my hypothetical  
5 is right, you're in violation of the statute?

6 MR. KULEWICZ: Not necessarily, Your  
7 Honor, because then -- then -- then you go --  
8 then you go to the next --

9 JUSTICE KAGAN: You were just in  
10 violation of the statute 10 seconds ago.

11 MR. KULEWICZ: No, no, because, Your  
12 Honor, there's more to it than that. That --  
13 that's the first question that you ask.

14 JUSTICE KAGAN: I -- I just want to  
15 know the answer to that first question.

16 MR. KULEWICZ: Well, just --

17 JUSTICE KAGAN: A hundred percent, a  
18 hundred percent, are you in violation of the  
19 statute?

20 MR. KULEWICZ: No. No, Your Honor,  
21 because there's more to it than that be -- what  
22 -- what the Medicare Secondary -- Secondary  
23 Payer Act says is that if that -- if that  
24 situation exists, if you have -- whether it's a  
25 hundred percent overlap or -- or straight out

1 end-stage renal disease, if they are all on one  
2 side -- if the benefits that they have under the  
3 package are different and it's 100 percent on  
4 that side, then you go to the -- to the -- on  
5 the basis of qualifying phrases.

6 Are they on there because on the basis  
7 of their end-stage renal disease or the need for  
8 renal dialysis or in a -- a related matter,  
9 bearing in mind there are a number of -- of  
10 utterly lawful and reasonable classifications  
11 of -- of plans. A plan can differentiate the  
12 benefits made available based upon seniority,  
13 collective bargaining status, geography --

14 JUSTICE KAGAN: I mean, we could go  
15 down a list of these kinds of diseases with  
16 these kinds of treatments that are always  
17 necessary for that disease and only used for  
18 people with that disease. You know, we can --  
19 we can do diabetes type 1 and insulin, or we  
20 could do antiretrovirals and AIDS.

21 And these are -- you know, you  
22 understand why people don't want to pay for  
23 these things. They're expensive.

24 But isn't that exactly what Congress  
25 was trying to do? It's saying stop trying to

1 get out of paying for the only treatment that is  
2 appropriate for a particular disease.

3 MR. KULEWICZ: Well --

4 JUSTICE KAGAN: And now you say, well,  
5 we can do that. We just don't have to use the  
6 words end-stage -- end-stage renal disease.

7 MR. KULEWICZ: Your Honor, Congress  
8 legislated both an objective and a means. The  
9 objective plainly was to protect the Medicare  
10 fisc after the usage of the Medicare benefit  
11 had -- had grown exponentially over original  
12 projections.

13 So -- but then the means by which it  
14 said it required the plans to do that are not  
15 take into account during the coordination period  
16 and not -- but not differentiate in the benefits  
17 that it provides between individuals with  
18 end-stage renal disease and others covered by  
19 the plan.

20 So you could use --

21 JUSTICE KAGAN: So I -- I -- I take  
22 the -- that answer to be something along the  
23 lines of -- and this is, you know, possibly  
24 right -- we have found a perfect end run around  
25 the statute, but, you know, sometimes statutes

1 have perfect end runs and, if the statute  
2 doesn't proscribe it, too bad.

3 MR. KULEWICZ: What the text of this  
4 statute pertains to, Your Honor, though, is  
5 distinctions between individuals, not  
6 distinctions between services. If -- if we look  
7 to the clear text of the statute, it says what  
8 it says and does not say what it does not say.

9 The -- what the statute says is --

10 JUSTICE KAGAN: I mean, you -- we  
11 could go through a whole host of these. Mr.  
12 Waxman has a lot of them in his brief. You  
13 know, if you say you can't differentiate between  
14 Orthodox Jews and everybody else and then you  
15 have a tax on yamakas and kosher food, are you  
16 doing that differentiation or not?

17 MR. KULEWICZ: Well, that -- of  
18 course, in the Bray case, what the Court did was  
19 to reject that sort of a classification as a  
20 basis for ipso facto invidious discrimination.

21 Here, what -- what we are -- what this  
22 plan does, Your Honor, it's -- it's essential,  
23 it's vitally important to the case, this plan  
24 provides exactly the same benefit to every  
25 individual in the plan. There is no --

1 CHIEF JUSTICE ROBERTS: Well, I --

2 MR. KULEWICZ: -- differentiation in  
3 the benefits made available. What the Medicare  
4 Secondary Payer Act measures is, is there a  
5 difference between the benefits provided to the  
6 individuals.

7 CHIEF JUSTICE ROBERTS: I -- I want to  
8 make sure I understand your answer because,  
9 obviously, Justice Kagan's line of questioning  
10 is very important. And I want to know if you  
11 rely on the statutory language in -- in your  
12 answer to her and whether that's how the  
13 statutory language should be read, because the  
14 practical result, obviously, is not one that I  
15 think the people writing the statute would want  
16 to sanction if it's the exact same result.

17 But the statute says whether -- it  
18 turns on whether or not the health plan takes no  
19 notice whatsoever of whether the claimants are  
20 eligible. So even if, for example, it's a  
21 hundred percent proxy between people who are  
22 over six feet tall and, you know, people who  
23 have blue eyes or whatever and you cannot take  
24 account of how tall they are, is it really the  
25 case that you would be fine so long as you just

1       asked -- asked if they had blue eyes or not?

2               MR. KULEWICZ: Well, Your Honor, we're

3       --

4               CHIEF JUSTICE ROBERTS: That's an

5       odd -- medically an odd suggestion,

6       hypothetical, but my -- my point is you could

7       have -- there could be a hundred percent proxy,

8       but you only take account of the one -- one

9       feature. Does that give you an out?

10              MR. KULEWICZ: Well, in -- in response

11       to Your Honor's first question, we rely

12       specifically on the text of this statute. And

13       what Congress did here is it, when it wrote the

14       text of the statute, it used classifications

15       that are laser-focused on the congressional

16       purpose.

17              The congressional purpose was to --

18       was to temper the overruns from estimates of

19       what the Medicare eligibility was going to cost,

20       and that's people who are eligible -- entitled

21       to or eligible for Medicare and that -- on the

22       basis of an ESRD diagnosis. So that's exactly

23       the classification that it used in the statute.

24              It -- it is -- it is the one perfect

25       overlap here because it -- it -- it overlaps

1 directly with the objective of the -- the  
2 Medicare Secondary Payer Act.

3 JUSTICE SOTOMAYOR: So you're  
4 disagreeing with both circuits, the Ninth and  
5 the Sixth here. Both said, if you differentiate  
6 and pay less for a drug that's used only for  
7 ESRD patients, that's okay, they said that's not  
8 okay, that's a proxy, basically, but both  
9 circuits agreed that would not be okay.

10 MR. KULEWICZ: We -- Your Honor,  
11 ultimately, we --

12 JUSTICE SOTOMAYOR: And the Ninth  
13 Circuit also accepted the proposition that this  
14 wasn't a proxy because there were some non-ERSD  
15 patients who had acute kidney conditions that  
16 were receiving the same benefits. But, if the  
17 other side is right, that all those people are  
18 treated in hospital, so that we go to Justice  
19 Kagan's hypothetical, that this really is a  
20 hundred percent.

21 MR. KULEWICZ: Well --

22 JUSTICE SOTOMAYOR: -- E -- ERSD  
23 patients, you're saying you're not violating.

24 MR. KULEWICZ: Of course -- of course,  
25 Your Honor, the other side is not correct in

1 saying that there is a -- a correlation there.  
2 Ever since the Trade Preferences Extension Act  
3 of 2015, there is no correlation. Now people  
4 with acute kidney injury who go to outpatient  
5 dialysis, people with end-stage renal disease  
6 can get inpatient dialysis when they're -- when  
7 they're in a hospital.

8 The -- the -- the Ninth Circuit and  
9 the Sixth Circuit, the -- the difference between  
10 the Ninth Circuit and the Sixth Circuit is the  
11 Ninth Circuit stuck with the statutory text,  
12 honored the statutory text, honored the  
13 statutory text, read it verbatim and -- and  
14 literally.

15 The Sixth Circuit has -- has expanded  
16 upon that in a way that -- that goes far beyond  
17 the -- the -- what the text would allow.

18 JUSTICE BREYER: Why -- why does this  
19 not violate the statute from your point of view?  
20 I think it obviously doesn't, what I'm about to  
21 say, but I want to know why.

22 Every single ESRD patient gets  
23 outpatient dialysis, all right? So the  
24 insurance plan says you're going to get  
25 90 percent of the cost back. If you have a



1 heart attack, however, you get 95 percent of the  
2 cost back, okay?

3 Why doesn't that violate this statute?

4 MR. KULEWICZ: So long as that -- so  
5 long as that benefit package was available, Your  
6 Honor, to everybody covered by the plan, it  
7 would not violate the statute. The plan --

8 JUSTICE BREYER: Because it did --  
9 look, it -- it's only the ESRD patients that get  
10 90 percent, and the heart attack patients --

11 MR. KULEWICZ: Well --

12 JUSTICE BREYER: -- get 95.

13 MR. KULEWICZ: Oh, I'm sorry.

14 JUSTICE BREYER: Why -- why doesn't  
15 that violate the statute?

16 MR. KULEWICZ: I -- I -- I  
17 misunderstood Your Honor's hypothetical. If  
18 there were -- if there were a -- if there were a  
19 condition that singled out patients with ESRD  
20 and differentiated in the benefits to ESRD, if  
21 there was some distinction between the benefits  
22 available to a patient with ESRD and others  
23 covered by the plan, then the issue would arise  
24 under the differentiation clause.

25 JUSTICE BREYER: It would, but it

1       seems to me there are 10,000 different diseases,  
2       and I can't believe that -- that insurance plans  
3       cover them all the same.

4               MR. KULEWICZ: Right.

5               JUSTICE BREYER: Do they?

6               MR. KULEWICZ: Which is exactly one of  
7       the problems with the --

8               JUSTICE BREYER: Yeah, yeah, okay. So  
9       -- so then my question. My question was, if you  
10      give ESRD patients 90 percent, but you give  
11      people with the common cold 99 percent, you give  
12      people with heart attacks 83 percent, why  
13      doesn't all that violate the statute?

14              MR. KULEWICZ: Your Honor, because the  
15      statute contains no requirement of any  
16      particular benefit. The Medicare Secondary  
17      Payer Act does not prescribe any particular  
18      benefit for --

19              JUSTICE BREYER: So your answer to  
20      Justice Kagan, then is even if there are --  
21      everybody that gets outpatient renal dialysis  
22      has ESRD, everybody, and we give everybody  
23      62 percent of the charge, all those ESRD, and we  
24      give some other person with a heart attack more,  
25      that doesn't violate the statute because

1       everybody getting ESRD is getting the same?

2               MR. KULEWICZ: That's correct, Your  
3       Honor. If --

4               JUSTICE BREYER: Are you sure that's  
5       correct?

6               MR. KULEWICZ: Well, Your Honor, that  
7       -- that package of benefits, if I understand  
8       Your Honor's hypothetical correctly, is one that  
9       would be applied uniform -- the same package of  
10      benefits applied uniformly across a plan in a  
11      context -- in the context of a statute that has  
12      no requirement of any specific benefit.

13              JUSTICE BREYER: I need to understand  
14      it from your point of view, and then I want to  
15      see if the other people -- what Mr. Waxman  
16      thinks of it.

17              CHIEF JUSTICE ROBERTS: Thank you,  
18      counsel.

19              Justice Thomas, anything further?

20              JUSTICE THOMAS: Nothing for me,  
21      Chief.

22              CHIEF JUSTICE ROBERTS: Justice  
23      Breyer, anything further?

24              Justice Alito?

25              JUSTICE ALITO: Well, I'm somewhat

1     baffled by this -- the statutory language. And  
2     1395y(b)(1)(C), I start out sort of  
3     understanding it. The plan may not  
4     differentiate in the benefits it provides  
5     between individuals having ESRD and other  
6     individuals covered by such plan on the basis of  
7     the existence of ESRD. All right. I can -- I  
8     can understand that.

9             But, after that point, a group health  
10    plan may not differentiate in the benefits it  
11    provides between individuals having ESRD and  
12    other individuals covered by such plan on the  
13    need for renal dialysis.

14            What does that mean? In what sense is  
15    it different from what I just read?

16            MR. KULEWICZ: Because what -- what  
17    that means is, if a plan -- if the reason that  
18    the different package of benefits goes to the  
19    patients with ESRD, if the reason for that is  
20    because of their need for renal dialysis, then  
21    that would -- that would constitute a -- that  
22    would state a claim under the Medicare Secondary  
23    Payer Act.

24            JUSTICE ALITO: What does that add to  
25    the language that came before it?

1                   MR. KULEWICZ: Because it -- well,  
2     Your Honor, it adds several things. The -- a  
3     plan -- if a plan were to say that it would  
4     cover individuals who need kidney transplants,  
5     but it was not -- but it was going to -- there  
6     was going to be a separate package of benefits  
7     for individuals who needed renal disease -- I'm  
8     sorry, renal dialysis, that -- that, of course,  
9     would be one of the distinctions it would  
10    address.

11                  But, overall, what it addresses is, if  
12    the plan -- if the plan differentiates in the  
13    benefits between individuals with end-stage  
14    renal disease and others on the basis of the  
15    need of the individual for -- with end-stage  
16    renal disease for renal dialysis, then that  
17    would constitute a violation of the statute.

18                 JUSTICE ALITO: I mean, I thought the  
19    first clause meant that if you -- you have  
20    people with end -- end-state renal disease and  
21    you have to treat them the same way, give them  
22    the same benefits as other people who are  
23    identical, except for the -- except for having  
24    ESRD, that's right?

25                 MR. KULEWICZ: Well, let me give you

1 -- yeah. I -- I think I can address Your  
2 Honor's concern. So the -- the first qualifying  
3 phrase, "differentiate on the basis of the  
4 existence of end-stage renal disease," that  
5 would be a plan that said benefits are different  
6 just by virtue of having end-stage renal  
7 disease.

8 JUSTICE ALITO: Right.

9 MR. KULEWICZ: The second -- the  
10 second scenario is it would be different based  
11 upon the -- the need of somebody with end-stage  
12 renal disease for renal dialysis as opposed to a  
13 -- a -- a kidney --

14 JUSTICE ALITO: Okay. So you have  
15 somebody with end-state renal disease who needs  
16 dialysis and you're comparing that person to  
17 whom?

18 MR. KULEWICZ: To -- to other  
19 individuals covered by the plan.

20 JUSTICE ALITO: Who don't need -- who  
21 --

22 MR. KULEWICZ: No. So they're -- a  
23 person with acute kidney injury would need renal  
24 dialysis, Your Honor.

25 JUSTICE ALITO: Well, that's what --

1       that's what was addressed by the first language.

2               MR. KULEWICZ: But -- so -- so, if  
3       you're -- you can -- it -- it's two separate  
4       scenarios, Your Honor. What the first clause  
5       would identify or what it addresses a package of  
6       benefits is different simply because the  
7       individual has end-stage renal disease. That --  
8       that would not -- that would not include persons  
9       with acute kidney injury.

10              So then the second -- because that's  
11       -- that's not an end-stage situation. The  
12       second qualifying phrase would address people  
13       with end-stage renal disease who need renal  
14       dialysis. If -- if that were the basis for  
15       differentiation of the package, there would be  
16       issues under the Medicare Secondary Payer Act.

17              JUSTICE ALITO: And then we get to the  
18       third part, may not differentiate in the  
19       benefits it provides between individuals having  
20       ESRD and other individuals covered by such plan  
21       in any other manner.

22              What does that mean?

23              MR. KULEWICZ: Your Honor, what that  
24       means is -- is any other manner related to the  
25       ESRD diagnosis. Under the ejusdem generis canon

1 of statutory construction, when we have a -- a  
2 general -- when a general word or words follow a  
3 -- a series of specific words, they necessarily  
4 relate to the condition that the -- that the  
5 limiting words address.

6 So, in any other manner, in any other  
7 related manner, you know, for example, if the --  
8 if a plan said that -- that benefits would be  
9 differentiated for those who need manual removal  
10 of waste products and excess fluid from the  
11 blood, I mean, that would be a -- a --  
12 synonymous, related to the end-stage renal  
13 disease, and that would constitute a violation.

14 They each -- each serve a separate  
15 purpose. So the first -- the first relates to  
16 the condition. The second relates to one of the  
17 therapies. The third relates to differentiation  
18 on the basis of the diagnosis in general.

19 JUSTICE ALITO: Okay. Well, I will  
20 ponder all that.

21 There are various categories of  
22 entities and people who might be financially  
23 affected by the outcome here. There are the  
24 group health plans. There are the two companies  
25 that provide dialysis or basically two companies



1     that provide dialysis.  There's Medicare.  And  
2     there are the people with ESRD.

3                 To what extent are people in the  
4     latter category going to be affected by the  
5     outcome?

6                 MR. KULEWICZ:  Your Honor, if the  
7     Court were to affirm the Sixth Circuit and --  
8     and it goes back and the judgment is entered for  
9     what DaVita seeks here, which is the right to be  
10    paid its undiscounted charges, it would be  
11    disastrous for people who have end-stage renal  
12    disease and are -- are covered simply by plans  
13    because that would be the situation where right  
14    now they're paying 30 percent of 125 percent of  
15    the Medicare rate, which is -- which would be in  
16    the \$90 range, \$96 range.  Paying 30 percent of  
17    the undiscounted charges could be up to \$1800  
18    per treatment, and that would very quickly  
19    exhaust their -- exhaust resources and -- and  
20    reach their out-of-pocket maximum within the  
21    space of -- of two to three treatments here.

22                So -- and it would be equally  
23    catastrophic for plans because it would -- it  
24    would absorb plan resources that are needed for  
25    other -- to cover other vitally important health

1 conditions as well.

2 JUSTICE SOTOMAYOR: I'm sorry, but to  
3 --

4 JUSTICE ALITO: Okay. So it would be  
5 -- just one -- one more follow-up. So, if you  
6 were to lose, it would be bad for your client,  
7 bad for other group plans, bad for the people  
8 with end-stage renal disease, but good for Mr.  
9 Waxman's client and for Medicare?

10 MR. KULEWICZ: Your Honor, I don't  
11 think I heard the -- the end phrase.

12 JUSTICE ALITO: And Medicare.

13 MR. KULEWICZ: No, I don't think it  
14 would be good for Medicare either, Your Honor,  
15 because what would happen in that situation, if  
16 -- people that would be on -- one can easily  
17 imagine a mass migration out of group health  
18 plans straight into Medicare, which is exactly  
19 the situation that we're trying to avoid.

20 Patients right now who are -- who are  
21 paying on a -- on a allowable cost basis with a  
22 reference-based price to in particular the  
23 Medicare price here, they're paying a much lower  
24 rate, their actual out-of-pocket.

25 There's a specter of balance billing,

1 but the important thing to remember about that  
2 is that that's a function -- the only thing that  
3 we can do in my -- that the Petitioners can do  
4 to avoid balance billing is to pay the full  
5 undiscounted charge because then, at that point,  
6 there -- there's no bill left over.

7 We could pay -- we could pay  
8 750 percent of the Medicare rate and there --  
9 there would still be a balance billing, but  
10 it's -- it's -- that is something that is  
11 exclusively within the control of Respondents.

12 And unless the Medicare Secondary  
13 Payer Act is going to be construed as something  
14 that -- that makes it -- gives a compulsory duty  
15 to group health plans to do everything they can  
16 to stop dialysis providers from inflicting the  
17 harm they can inflict through balance billing,  
18 which I don't think is a result that Congress  
19 ever contemplated or would bring us here,  
20 they're going to be -- they're going to be in  
21 a -- in a very precarious position --

22 CHIEF JUSTICE ROBERTS: Thank you.

23 MR. KULEWICZ: -- the individuals.

24 CHIEF JUSTICE ROBERTS: Thank you,  
25 counsel.

1 Justice Sotomayor?

2 JUSTICE SOTOMAYOR: What forces the  
3 dialysis companies to limit what they're  
4 charging the patients? You're limiting what  
5 you're paying the patient, but what limits them  
6 -- Medicare limits them. Medicare, if you  
7 accept Medicare, which they have to, basically,  
8 for this, they can't charge more than Medicare  
9 permits and they can't balance. But what stops  
10 the companies from charging patients whatever  
11 they want?

12 MR. KULEWICZ: Nothing, Your Honor.

13 JUSTICE SOTOMAYOR: Exactly.

14 MR. KULEWICZ: The -- the only  
15 situation in which they cannot charge -- in  
16 which they're bound by the Medicare rate is when  
17 the individual -- or affected by the Medicare  
18 rate is when the individual has enrolled in  
19 Medicare.

20 JUSTICE SOTOMAYOR: So why -- why --  
21 why does your system help patients? Meaning  
22 your system stops them from paying -- for you  
23 giving them that little extra money, but it  
24 doesn't stop them from being charged for the  
25 real cost of the treatment and not getting

1 anything for it.

2 MR. KULEWICZ: Well, the real cost of  
3 the treatment, of course, is -- is \$242, and --

4 JUSTICE SOTOMAYOR: No. That's what  
5 you're paying.

6 MR. KULEWICZ: Well, no, we're --  
7 we're paying -- we're paying based on \$332,  
8 which is 125 percent of the Medicare rate. We  
9 pay 70 --

10 JUSTICE SOTOMAYOR: No, no, no. My  
11 point is --

12 MR. KULEWICZ: I'm sorry.

13 JUSTICE SOTOMAYOR: -- if they are --  
14 if they charge 5,000 per treatment, you're  
15 limiting it to \$200. The patient does not save.  
16 They still have to pay the 5,000 minus the \$200  
17 you're paying.

18 MR. KULEWICZ: If -- they -- they  
19 would have to pay the balance of the \$5,000,  
20 Your Honor, only if DaVita exercised it --  
21 its -- its right to balance bill there. It --  
22 it does not and notably in this case --

23 JUSTICE SOTOMAYOR: Yeah, but what --  
24 but the point is that you're not helping the  
25 patient in those situations.

1                   MR. KULEWICZ: The only way that we  
2     can avoid balance billing, Your Honor, in a  
3     situation where -- where DaVita will not come in  
4     network -- and, notably, there's no allegation  
5     in this case that DaVita has ever sought to come  
6     in network or wants to come in network and has  
7     been denied the opportunity to come in network.  
8     The only way that we can avoid balance billing  
9     would be to pay the full -- pay on the basis of  
10    the full undiscounted charge --

11                  JUSTICE SOTOMAYOR: All right. Thank  
12    you.

13                  MR. KULEWICZ: -- which would put the  
14    patient in a much worse position because then --  
15    right now, they're paying 30 percent of  
16    125 percent of the Medicare rate. Then they  
17    would be paying 30 percent of up to \$6,000 per  
18    treatment.

19                  CHIEF JUSTICE ROBERTS: Thank you,  
20    counsel.

21                  Justice Kagan, anything further?

22                  JUSTICE KAGAN: Yeah. I'd like to go  
23    back to where Justice Alito was taking you about  
24    the exact language of this statute, and it is a  
25    confusingly written statute, but here's a theory

1 of it.

2 So the first, it says you're not to  
3 differentiate between individuals having  
4 end-stage renal disease and other individuals in  
5 the plan, all right? Right?

6 MR. KULEWICZ: In -- in the benefits  
7 provided.

8 JUSTICE KAGAN: Yeah, yeah, yeah, in  
9 the benefits provided.

10 Now, when it says on the basis of the  
11 existence of end-stage renal disease, that's  
12 completely redundant because, if I tell you not  
13 to differentiate between people with end-stage  
14 renal disease and those without end-stage renal  
15 disease, I'm obviously telling you not to  
16 distinguish based on the fact that some have  
17 end-stage, but, you know, that they have  
18 end-stage renal disease and they don't. Right?  
19 That's just redundant?

20 MR. KULEWICZ: Well, Your Honor, may  
21 I -- may I push back with an alternative  
22 hypothetical?

23 JUSTICE KAGAN: No, definitely not.

24 MR. KULEWICZ: Okay. All right.

25 (Laughter.)

1 JUSTICE KAGAN: I mean, you can push  
2 back -- you know, I'm not saying you can't push  
3 back at some point, but -- but I -- I think what  
4 I just said is pretty obviously true.

5 All right. Now it goes on. You also  
6 can't distinguish on the basis of the need for  
7 renal dialysis. All right. Now what does  
8 Congress mean when it says that? And it's not  
9 particularly precise and it's not particularly  
10 grammatical, but why is that there?

11 It's there because they know you're  
12 going to do exactly what you're doing. It's  
13 there because they're saying don't try to  
14 distinguish between those with end-stage renal  
15 disease and those without end-stage renal  
16 disease by finding the perfect proxy, which is  
17 the therapy rather than the condition.

18 So that's why that's there. And then  
19 the "in any other manner," in case there's a  
20 proxy that we haven't thought of, don't try that  
21 one either. So all together this is basically  
22 saying you can't distinguish between people with  
23 end-stage renal disease and those without. You  
24 can't do it directly. You can't do it by means  
25 of the fact that this group needs dialysis and



1     this group doesn't. And you can't do it by  
2     finding any other proxy that perfectly separates  
3     these two groups.

4                 MR. KULEWICZ: Well, Your Honor, we  
5     respectfully disagree, and maybe if I can give a  
6     hypothetical that might cast it in a different  
7     light. Say that a plan said that there would be  
8     one set of benefits for people in North Dakota  
9     and another set of benefits for people in South  
10    Dakota, and it just -- just so it turns out that  
11    the people in South Dakota, some of the covered  
12    individuals, the -- the only individuals covered  
13    by the plan who have end-stage renal disease are  
14    in South Dakota.

15                So they -- they would -- they would  
16    raise -- understandably, they would raise an  
17    issue saying, hey, I've got end-stage renal  
18    disease, my benefits are not the same as -- as  
19    the people in North Dakota. Why is that?

20                And -- and -- and so then -- then we  
21    go to the -- that's when we go to the first,  
22    second, and third elements of the clause. If it  
23    -- you know, they would say, is it because I  
24    have end-stage renal disease? The plan may say  
25    no, it -- it's because -- because this is on the

1 basis of -- of geography, the laws in North  
 2 Dakota are different from the laws in South  
 3 Dakota or no, it's on the basis of -- of -- of  
 4 collective bargaining, the people in -- in North  
 5 Dakota are -- are in a bargaining unit, the  
 6 people in South Dakota are not in a bargaining  
 7 unit. It may be on the basis of -- of  
 8 full-time/part-time, current employee/former  
 9 employee.

10 So those -- it -- it -- it's not --  
 11 it's not a redundant appellation there in  
 12 that -- in that case, Your Honor. If -- if --  
 13 it's not -- just because there is a --

14 JUSTICE KAGAN: Is there some  
 15 relevance to this case?

16 MR. KULEWICZ: Well, no. Actually --

17 JUSTICE KAGAN: I mean, what -- how do  
 18 you -- how --

19 MR. KULEWICZ: Because the benefits in  
 20 this case are -- are applied -- the same  
 21 benefits are applied uniformly across the board  
 22 to every participant in the plan. There is no  
 23 differentiation --

24 JUSTICE KAGAN: Yeah, I mean, that's  
 25 like Anatole France is sleeping under the bridge

1 and the poor and the rich alike, right?

2 MR. KULEWICZ: No, Your Honor, it's --  
3 I mean, it's -- it's a --

4 JUSTICE KAGAN: It's applied to  
5 everybody.

6 MR. KULEWICZ: Well --

7 JUSTICE KAGAN: Even those people who  
8 don't have any use for end-stage -- for  
9 dialysis.

10 MR. KULEWICZ: What the law that  
11 Congress gave us says is -- is that a plan may  
12 not differentiate in the benefits that it  
13 provides between individuals with end-stage  
14 renal disease and others covered by the plan.

15 So the -- the threshold inquiry --

16 JUSTICE KAGAN: Based on the need for  
17 renal dialysis.

18 MR. KULEWICZ: Well, and you -- you --  
19 you get to that if there's a differentiation,  
20 but there has to be -- your threshold question,  
21 Your Honor, is, is there a -- is there a  
22 differentiation in benefits here? And if -- if  
23 there's no differentiation in benefits, if  
24 everybody in the plan has the same benefits,  
25 then -- then the dependent, the qualifying

1 client, would be no different.

2 JUSTICE KAGAN: I'll just say it again  
3 maybe, you know, more briefly than I said it  
4 before just in case it's a problem of  
5 communication on my end.

6 MR. KULEWICZ: All right.

7 JUSTICE KAGAN: But this based on  
8 thing -- this based on thing is supposed to tell  
9 you not to do exactly what you're doing. This  
10 based on thing is saying don't do it based on  
11 the condition itself, don't do it based on the  
12 therapy, and don't do it based on anything else  
13 that is a proxy for the condition.

14 MR. KULEWICZ: But what it is saying  
15 not to do, Your Honor, is to differentiate the  
16 benefits between individuals here. It is -- it  
17 is not -- it does not prescribe any benefits.  
18 It does not prescribe parity of benefits.

19 JUSTICE BREYER: Okay. Is this your  
20 point? I -- I mean, I -- I promise I'm almost  
21 certainly wrong, but I've had a really hard time  
22 grasping it.

23 You're saying that if there is a human  
24 being in this plan, whether he has end-state or  
25 not, and if that individual should he get

1 end-state would be treated worse, that is  
2 covered by this language?

3 MR. KULEWICZ: If -- if the -- if the  
4 end-stage renal disease diagnosis operates into  
5 a different plan --

6 JUSTICE BREYER: Let me say it again  
7 if you didn't get it. Did you get it or not?

8 MR. KULEWICZ: I -- I believe I do,  
9 Your Honor. Yes.

10 JUSTICE BREYER: Okay. Then am I  
11 right or wrong?

12 MR. KULEWICZ: If -- if the diagnosis  
13 ends up with a differentiation of benefits, then  
14 there would be a -- it would state a claim under  
15 the Medicare Secondary Payer Act.

16 JUSTICE BREYER: I'm trying to figure  
17 out what other -- is Justice Kagan correct,  
18 that's one possible reading, and I'm trying to  
19 see you think she's not, so I'm trying to figure  
20 out what your reading is, okay?

21 Mr. Smith who has a heart attack or  
22 Mr. Smith who has your plan, should he, Mr.  
23 Smith, get end-state renal disease, under the  
24 plan, he won't be treated as well as all the  
25 other 98,000 people who have interstate --

1 end-state, that would violate it?

2 MR. KULEWICZ: Yes, Your Honor, if  
3 that diagnosis changed his -- operated to change  
4 the plan benefits available to him, that would  
5 --

6 JUSTICE BREYER: Change it? It would  
7 change -- you're saying your plan doesn't do  
8 that, but if we had the imaginary plan that did  
9 do it, should Mr. Smith get end-state renal  
10 disease next year, he will be paid by your  
11 insurance company at a lower rate than the  
12 980,000 people -- or the 300,000 people who now  
13 have end-state renal disease?

14 MR. KULEWICZ: Well, that -- that  
15 would -- that sounds to me like it would be a  
16 differentiation, Your Honor.

17 JUSTICE BREYER: Okay.

18 MR. KULEWICZ: And -- and -- and we  
19 would go to --

20 JUSTICE BREYER: So now I see what  
21 you're saying. Maybe I was the only one who  
22 didn't understand what you were saying, but now  
23 I think I do. Thank you.

24 MR. KULEWICZ: Thank you, Your Honor.

25 CHIEF JUSTICE ROBERTS: Justice

1 Gorsuch, anything further?

2 Justice Kavanaugh?

3 Justice Barrett?

4 Thank you, counsel.

5 MR. KULEWICZ: Thank you, Your Honor.

6 CHIEF JUSTICE ROBERTS: Mr. Guarnieri,

7 I understand you're with us remotely.

8 MR. GUARNIERI: I am, Your Honor.

9 CHIEF JUSTICE ROBERTS: You may  
10 proceed.

11 ORAL ARGUMENT OF MATTHEW GUARNIERI  
12 FOR THE UNITED STATES, AS AMICUS CURIAE,  
13 SUPPORTING REVERSAL

14 MR. GUARNIERI: Thank you, Mr. Chief  
15 Justice, and may it please the Court:

16 The Medicare secondary payer statute  
17 does not forbid group health plans from adopting  
18 uniform limits on coverage for renal dialysis.  
19 Fundamentally, the non-differentiation provision  
20 forbids only arrangements under which a group  
21 health plan provides different benefits to  
22 individuals with end-stage renal disease and  
23 other individuals covered by the plan.

24 Petitioners' plan does not do that.  
25 Respondents' proxy theory is therefore

1     irrelevant. Its plan is not providing a  
2     different package of benefits in the first  
3     place, by proxy or otherwise.

4             Now it's true that uniform limits on  
5     dialysis principally affect those who need  
6     dialysis most, but this statute also does not  
7     impose disparate impact liability. Respondents'  
8     contrary view is inconsistent with the text,  
9     purpose, and history of the statute and would be  
10    unworkable in practice.

11            This statute serves an important but  
12    limited function in coordinating benefits  
13    between Medicare and group health plans. It  
14    does not entitle dialysis providers to any  
15    particular level of reimbursement.

16            I welcome the Court's questions.

17            JUSTICE THOMAS: Counsel, there's been  
18    some discussion about the effects of the  
19    different positions that have been taken on  
20    this, interpreting this statute and this payment  
21    differentiation problem. What do you think the  
22    effects would be?

23            MR. GUARNIERI: Justice Thomas, we are  
24    concerned, frankly, about the effects that this  
25    decision may have. The provisions in this



1 statute have been in substantially the same form  
2 since 1989. And CMS's implementing regulations,  
3 including a regulation that expressly permits  
4 plans to impose uniform limits on coverage for  
5 dialysis, those regulations have been on the  
6 books since 1995.

7 And we haven't seen the sky falling.  
8 We haven't seen examples -- many examples in  
9 which there is -- plans have engaged in creative  
10 ways to try to circumvent the statute, but,  
11 certainly, a decision from this Court could  
12 bring renewed prominence to this issue, so we  
13 don't -- we don't sort of take those policy  
14 concerns lightly.

15 Of course, Medicare itself is  
16 available as a backstop here. The whole design  
17 of this statutory scheme is that individuals who  
18 develop end-stage renal disease after three  
19 months of dialysis, they are eligible to enroll  
20 in Medicare. And during the 30-month  
21 coordination of benefits period, Medicare is  
22 there, if they would like to enroll in Medicare  
23 and pay for Part B, Medicare is there to cover  
24 any potential gaps in the coverage that the  
25 group health plan provides.

1 JUSTICE THOMAS: Thank you.

2 CHIEF JUSTICE ROBERTS: Counsel, what  
3 is your response to Justice Kagan's line of  
4 questioning about proxies? If you have somebody  
5 that's -- you know, it's a hundred percent  
6 proxy, it does not take whatever it is you're  
7 not supposed to take, Medicare eligibility, into  
8 account at all, but it just turns out that the  
9 group is the same as it would be if it did take  
10 the Medicare in -- into account?

11 MR. GUARNIERI: Sure. You know,  
12 again, as I said at the outset, I don't think  
13 the proxy theory is really sufficient for  
14 Respondents to prevail in this case, and that's  
15 just a result of the plain text of the statute.

16 1395y(b)(1)(C)(ii) states that group  
17 health plans "may not differentiate in the  
18 benefits it provides" -- a group health plan  
19 "may not differentiate in the benefits it  
20 provides between individuals with end-stage  
21 renal disease and others covered by the plan."

22 And if a plan is providing the same  
23 package of benefits to all individuals who are  
24 covered by the plan, which is what Petitioners'  
25 plan does, then it is not differentiating in the

1     benefits it has provided, and, therefore, it is  
2     not violating this specific provision.

3             And so there's no -- no occasion  
4     arises to -- to inquire into whether the plan is  
5     drawing a -- a line among plan participants on  
6     an impermissible basis or on a -- as a matter of  
7     a proxy for an impermissible basis because  
8     there's no improper line drawing in the first  
9     instance.

10            JUSTICE KAGAN:   And -- and -- and how  
11     about my view of the statutory language, which  
12     does suggest that the statutory language itself  
13     indicates a concern that proxies will be found  
14     and attempting to really cut that off at the  
15     pass?

16            In other words, you know, don't  
17     distinguish between these two groups, people  
18     with ESRD and those without, based on the fact  
19     that they have the disease or based on the fact  
20     that they need renal dialysis or based on some  
21     other proxy you can come up with.   Just don't do  
22     it at all.

23            MR. GUARNIERI:   I take the point,  
24     Justice Kagan, and -- and, in some ways, that's  
25     another reason -- I mean, the statutory text

1     itself here furnishes an additional basis that  
2     you don't need to kind of import into this  
3     coordination of benefits statute the concept of  
4     proxy discrimination drawn -- drawn from an  
5     opposite body of federal civil rights law.

6             JUSTICE KAGAN:  No, I was suggesting  
7     that that --

8             MR. GUARNIERI:  But, of course --

9             JUSTICE KAGAN:  -- that back language,  
10    Mr. Guarnieri, is the kind of don't think you  
11    can end run this language.  That's what that  
12    language is -- is there for.

13            MR. GUARNIERI:  Well, but, Justice  
14    Kagan, that language all follows after the  
15    actual prohibition in the statute, and it is a  
16    prohibition against differentiating in the  
17    benefits that are being provided.

18            And so, if a plan is not doing that,  
19    if a plan is providing all individuals covered  
20    by the plan, regardless of whether or not they  
21    have end-stage renal disease and regardless of  
22    their need for renal dialysis, with the same  
23    package of benefits, meaning the same items and  
24    services are covered at the same premiums and  
25    any other sort of cost-sharing of individuals,

1     then the plan is not violating this specific  
2     provision.

3                 JUSTICE KAGAN:  Yeah, I think what  
4     most --

5                 MR. GUARNIERI:  This is a statute in  
6     which --

7                 JUSTICE KAGAN:  -- confuses me about  
8     this case, Mr. Guarnieri, is why you're on this  
9     side of it.  I mean, it just -- I mean, you  
10    know, I hate to say the obvious, but usually the  
11    government is concerned about the state of  
12    government finances.  And aren't you clearly  
13    going to end up paying more if the Petitioner  
14    wins than if the Respondent wins?

15                MR. GUARNIERI:  That -- that -- that  
16    may well be the case, Justice Kagan.  And,  
17    again, as I tried to say, as I tried to stress,  
18    in response to Justice Thomas's question, I  
19    mean, we don't -- we take these policy concerns  
20    lightly.  We don't think the policy -- I'm  
21    sorry, we don't -- don't take them lightly.  We  
22    just don't think in this instance that those  
23    policy concerns are sufficient to overcome the  
24    best reading of the statutory text.

25                JUSTICE KAGAN:  I'm -- I'm moved --

1                   MR. GUARNIERI: And, of course, the  
2 principle that we --

3                   JUSTICE KAGAN: -- by your adherence  
4 to -- I'm sorry. It's so -- it's so hard to do  
5 this with you not up here, Mr. Guarnieri.

6                   But, you know, I'm sort of moved by  
7 your adherence to principles of statutory  
8 interpretation, but, you know, usually, I mean,  
9 the government, you know, fights for the  
10 government's interests, especially when there's  
11 sort of such an obvious counterargument to your  
12 statutory argument. I mean, I --

13                  MR. GUARNIERI: Justice Kagan --

14                  JUSTICE KAGAN: -- I keep on thinking  
15 surely they --

16                  MR. GUARNIERI: -- the principle that  
17 we are here to vindicate --

18                  JUSTICE KAGAN: Sorry. Sorry, Mr.  
19 Guarnieri, if I could just -- sorry about that.

20                  MR. GUARNIERI: Certainly.

21                  JUSTICE KAGAN: I just keep on  
22 thinking if I could just understand why they're  
23 on this side, maybe I would understand this  
24 whole case better. So I'm giving you, like,  
25 please, help me. Is there a policy reason

1     you're on this side?

2                   MR. GUARNIERI:   Sure.  Let -- let me  
3     see what I can do there.

4                   The principle that we are here to  
5     vindicate, which is that uniform limitations on  
6     coverage for renal dialysis do not themselves  
7     constitute impermissible differentiation, is a  
8     principle that is reflected in the regulations  
9     that CMS, the expert agency charged with  
10    administering this statute, has enacted.  And  
11    that's Section 161(c) in Part 411.  And the  
12    position that we are taking here is the one that  
13    is most consistent with the agency's  
14    longstanding regulation.

15                  Now, as to the broader question about,  
16    you know, wouldn't it be in the government's  
17    best financial interests for there to be, you  
18    know, circumstances in which group health plans  
19    could be compelled to pay higher rates to  
20    dialysis providers, you know, I don't -- I think  
21    part -- part of the story there is that Congress  
22    has, in general, in this statute chosen not to  
23    create an entitlement to dialysis coverage.  
24    That's consistent with Congress's overall  
25    choices in this area.  In particular, ERISA,

1     which is the preeminent federal law regulating  
2     the design of health benefits plans, does not  
3     mandate that plans cover particular services,  
4     and that's -- that's true even with respect to  
5     ERISA's non-discrimination provision.

6             And we think this statute  
7     fundamentally operates in the same way as that.  
8     It does not forbid uniform limitations on  
9     particular services. That is the policy  
10    decision that Congress made here. It's the  
11    decision -- it's a policy that is reflected in  
12    the Secretary's regulations, and -- and that --  
13    that's why we have chosen to support the  
14    Petitioners in this case.

15            Now, you know, again, we -- we have  
16    filed in support of reversal, not actually in  
17    support of Petitioners' brief, because we have  
18    policy concerns that plan practices like this  
19    could ultimately lead to greater costs for the  
20    Medicare program and -- and potentially worse  
21    coverage or worse options for individuals with  
22    end-stage renal disease. We just don't think  
23    the statute in its current form prohibits the --  
24    the particular plan provisions that are under  
25    scrutiny here.



1 JUSTICE ALITO: Could I ask you the  
2 question that I asked Petitioner about whose  
3 financial interests are at stake here? And I'm  
4 particularly concerned about the patients with  
5 end-stage renal disease.

6 He said that an affirmance here would  
7 work against their financial interests. Is that  
8 correct?

9 MR. GUARNIERI: It's hard to predict  
10 with certainty how -- how that would play out,  
11 Justice Alito. I take Petitioners' point to be  
12 that an affirmance, meaning that this plan was  
13 obligated to reimburse Respondents at  
14 Respondents' undiscounted rates, would mean that  
15 the -- an individual's coinsurance obligation,  
16 which under this plan is 30 percent of whatever  
17 the plan reimbursement rate is, would -- would  
18 skyrocket because they would be required to pay  
19 30 percent of the undiscounted rate.

20 The -- the -- the other point that  
21 Petitioners and their amici have made is that  
22 because the Medicare secondary payer statute  
23 itself does not require that group health plans  
24 provide coverage for renal dialysis, a decision  
25 in Respondents' favor might mean that more group

1 health plans choose not to cover dialysis at all  
2 if -- if, you know, the result of covering it  
3 would be exposing them to liability under the  
4 statute.

5 I just -- it's really -- it's  
6 difficult to -- to predict with any certainty  
7 what -- what would happen there. Certainly, as  
8 I -- as I said before, Medicare is a backstop  
9 here. The Medicare Part B monthly premium is  
10 \$170. That's a pretty reasonable amount.

11 Individuals who are concerned that  
12 their group health plans may provide  
13 insufficient coverage for their dialysis needs  
14 during the coordination period can enroll in  
15 Medicare as the secondary payer.

16 And -- and -- and even in that  
17 circumstance, that's going to save Medicare  
18 money in the sense that, you know, if -- if you  
19 take a circumstance -- if you take a situation  
20 in which the group health plan provides a  
21 relatively parsimonious coverage for outpatient  
22 dialysis and an individual makes a decision to  
23 enroll in Medicare as the secondary payer during  
24 the coordination period, the group health plan  
25 is still covering all of that individual's other

1 medical expenses, and that's going to save  
2 Medicare money. Medicare only steps in as the  
3 secondary payer with respect to items or  
4 services that the group health plan does not  
5 fully cover.

6 And, you know, that -- that's sort of  
7 -- that's another cost-saving feature of the  
8 statute irrespective of the dialysis issue.

9 JUSTICE ALITO: Could I ask you to  
10 follow up a bit on what you said about  
11 workability? This is basically sort of a -- a  
12 discrimination -- an anti-discrimination  
13 statute, and in an anti-discrimination statute,  
14 you have to compare people in one group with  
15 people in another group.

16 I understand how it works under your  
17 theory. It is a bit strange that the two groups  
18 are almost identical. But, if it's interpreted  
19 the way the Sixth Circuit interpreted it and the  
20 way Respondent interpreted it, you have the  
21 people who have end-stage renal disease and they  
22 need kidney dialysis, and the plan pays a  
23 certain amount of money to them for that  
24 service. What do you compare that to?

25 MR. GUARNIERI: I entirely agree with

1     you, Justice Alito. I don't think Respondents  
2     have very clearly answered that question. And  
3     as Judge Murphy explained in his partial dissent  
4     in the Sixth Circuit, it's -- the Medicare  
5     secondary payer statute itself does not provide  
6     guideposts for making that kind of judgment.

7             There is no kind of obvious comparator  
8     in terms of -- you know, if -- if it were a  
9     viable theory under the statute to say that you  
10    can't treat dialysis itself differently than  
11    some other services, what are those other  
12    services? Respondents have never said.

13            And so I do think that their view  
14    would -- would -- would give rise to substantial  
15    practical problems.

16            JUSTICE ALITO: All right. Thank you.

17            CHIEF JUSTICE ROBERTS: Justice  
18    Thomas, anything further?

19            Justice Breyer?

20            Justice Alito, anything further?

21            Thank you, Mr. Guarnieri.

22            MR. GUARNIERI: Thank you, Mr. Chief  
23    Justice.

24

25

1 CHIEF JUSTICE ROBERTS: Mr. Waxman.

2 ORAL ARGUMENT OF SETH P. WAXMAN

3 ON BEHALF OF THE RESPONDENTS

4 MR. WAXMAN: Mr. Chief Justice, and  
5 may it please the Court:

6 Differential treatment of outpatient  
7 renal dialysis is most certainly differential  
8 treatment of individuals with ESRD. Congress  
9 determined that and it determined it because  
10 Congress understood in 1972 and in 1981 and  
11 thereafter that ESRD patients uniquely and  
12 utterly need outpatient dialysis for the rest of  
13 their lives.

14 And a plan whose purpose as alleged  
15 here and effect is to move primary coverage of  
16 ESRD patients to Medicare is one that most  
17 certainly "takes into effect those patients'  
18 eligibility for Medicare."

19 The reading urged by the Petitioners  
20 and the solicitor general by which the  
21 anti-discrimination provision bars only plans  
22 that single out ESRD patients by name and the  
23 take-into-account provision only applies to  
24 plans that reference Medicare eligibility  
25 expressly, renders both of these statutory

1     protections utterly toothless.

2                     And in each respect, their reading  
3     violates the text of the statute. Take the  
4     anti-discrimination -- the anti-differentiation  
5     provision, which has occupied, I think,  
6     virtually all of the argument so far.

7                     That provision protects ESRD patients  
8     by prohibiting differential treatment either by  
9     express reference to ESRD patients or by proxy.  
10    The particular proxy codified in the statute and  
11    the one that is relevant here expressly  
12    prohibits differential treatment "on the basis  
13    of the need for renal diagnosis," a treatment  
14    that Congress has long understood to be  
15    completely inseparable from ESRD itself.

16                    Ninety-nine and a half percent of all  
17    of DaVita's outpatient patients, outpatient  
18    dialysis patients, have ESRD. There is simply  
19    no reasonable argument for singling out ES --  
20    outpatient dialysis as anything but differential  
21    treatment of individuals with ESRD.

22                    And as was noted, I think by Justice  
23    Sotomayor, even the Ninth Circuit in Amy's  
24    Kitchen agreed, and I'm quoting from the  
25    opinion, "a plan would violate the MSP if it

1 provided differential coverage for routine  
2 maintenance dialysis," that is, dialysis  
3 received only by persons with ESRD, than for all  
4 other -- all other dialysis. That is exactly  
5 what this plan does.

6 Now, as -- I know that I'm trenching  
7 on my two minutes, but I -- please interrupt me,  
8 but I just wanted to reference the fact that as  
9 has been mentioned by several members of the  
10 Court, there is another provision that is on the  
11 basis of either ESRD, calling it out by name, or  
12 the need for renal dialysis or any other manner.

13 And that's because, as -- as I think  
14 Justice Kagan's question suggested, Congress  
15 understood at the time that other proxies for  
16 ESRD might exist or more likely might come to  
17 exist with medical advances.

18 And so the statute also prohibits  
19 differentiation on any other manner, which in  
20 context should be understood to mean in any  
21 other manner that in effect singles out a  
22 treatment for ESRD.

23 I want to clarify just a couple of, I  
24 think, errors that my friend on the other side  
25 made. The notion that they are actually helping

1 beneficiaries because they are limiting the  
2 amount of balance billing available is -- is  
3 utterly wrong.

4           This -- one of the main reasons that  
5 -- that renal dialysis is disadvantaged here is  
6 that the plan says, unilaterally, there is no  
7 in-network service for this. If there were  
8 in-network service, as there is for virtually  
9 all employment group plans in the United  
10 States -- this is an extreme outlier. There's  
11 no balance billing at all.

12           If there was an in-network option, and  
13 this goes to -- to, I think, Justice Alito's  
14 questions about who's harmed. If there was an  
15 in-network option, there would be no balance  
16 billing and there -- and patients would have a  
17 right to treatment. They would have a right to  
18 treatment by somebody who was in network. Right  
19 now they don't.

20           And as the -- there -- there are some  
21 really terrific and very knowledgeable amicus  
22 briefs filed in this case. It is completely  
23 clear and Congress has understood that if this  
24 Court accepts the other side's ruling, there is  
25 no reason on God's green earth that UnitedHealth



1 and AETna and all the -- all the big plans that  
2 -- that -- health plans and big, big employer  
3 health plans, all of whom do not differentiate  
4 in any basis on the need for renal dialysis, I  
5 mean, they --

6 JUSTICE ALITO: Well --

7 MR. WAXMAN: -- have shareholders --

8 JUSTICE ALITO: -- I -- I don't --

9 MR. WAXMAN: -- of course they're  
10 going to do it.

11 JUSTICE ALITO: -- understand how your  
12 approach would work, but I assume you'll be able  
13 to explain it to me. So --

14 MR. WAXMAN: I hope.

15 JUSTICE ALITO: -- suppose a plan says  
16 that we will pay a maximum of X dollars, let's  
17 say \$1,000, per year for renal dialysis, period.

18 Is that vulnerable?

19 MR. WAXMAN: I'm sorry, is that what?

20 JUSTICE ALITO: Is that vulnerable?  
21 Is that illegal, in your view?

22 MR. WAXMAN: So the -- the answer is  
23 it depends. If what the plan says is for all  
24 other forms of, you name it, treatment, medical  
25 treatment, chronic medical treatment, we will

1 pay the ordinary and -- customary, ordinary, and  
2 reasonable cost except for renal dialysis,  
3 that's a differentiation that's prohibited by  
4 the statute.

5 If you have what's called a skinny  
6 plan, which is a plan that says, you know, we're  
7 going to provide for regular checkups, et  
8 cetera, et cetera, but we provide no benefits  
9 for chronic healthcare -- -

10 JUSTICE ALITO: Well, what if --

11 MR. WAXMAN: -- for heart disease --

12 JUSTICE ALITO: -- they do something  
13 like -- like, I understand, Medicare does? So  
14 they have a certain amount for different  
15 conditions. They go by the Medicare code. They  
16 -- they provide a certain amount for different  
17 conditions. So they -- they distinguish among,  
18 discriminate among, different medical  
19 conditions, and they pay different amounts for  
20 different medical conditions.

21 MR. WAXMAN: So, Justice Alito,  
22 there's no doubt that different medical  
23 treatments require different amounts.

24 JUSTICE ALITO: Yeah, so how do you  
25 compare what is -- maybe they're being very

1 stingy with renal dialysis as compared to other  
2 -- I just don't know what the standard is for  
3 making the comparison.

4 MR. WAXMAN: So, the -- I think you've  
5 just identified the standard, which is if there  
6 is a differentiation on the basis of the need  
7 for renal dialysis, a differentiation with --  
8 and we can talk about what the relevant  
9 comparators --

10 JUSTICE ALITO: Right.

11 MR. WAXMAN: -- are -- there is a  
12 violation.

13 Now, in this case there's no dispute  
14 about the relevant character -- comparators.  
15 This plan, as is plausibly alleged in the  
16 complaint, and I don't think there's really any  
17 dispute, but if there were, it would be  
18 developed when -- when, and I hope, the -- the  
19 order dismissing the complaint is reversed,  
20 there -- I've lost my thought for a minute.

21 JUSTICE BREYER: Who are you going to  
22 compare it with?

23 MR. WAXMAN: Yeah. So here, there's  
24 no doubt whatsoever that outpatient renal  
25 dialysis, that is, maintenance dialysis, the

1 dialysis that ESRD patients alone need to  
2 survive to the next day for the entire rest of  
3 their lives, is treated worse in a number of  
4 respects than any other.

5 JUSTICE KAGAN: So this might be --

6 MR. WAXMAN: -- treatment.

7 JUSTICE KAGAN: -- an easy case, but I  
8 think what Justice Alito was sort of suggesting  
9 to you is let's take a case where there are five  
10 different chronic health conditions and the plan  
11 sets up a payment scheme for each of the five.  
12 And it's like, well, you know, it's not as  
13 though four of them, they say we'll -- we'll pay  
14 the reasonable costs, and the fifth, we'll pay  
15 \$500. You know, they put -- they put different  
16 --

17 MR. WAXMAN: Yep.

18 JUSTICE KAGAN: -- price tags on each.  
19 What are you supposed to do?

20 MR. WAXMAN: So I think what are you  
21 supposed to do is the same thing under our  
22 reading of the statute or the other side's  
23 reading of the statute. What if the statute  
24 said instead -- let's take an example. We're  
25 going to pay everybody -- we're going to pay the

1     ordinary, reasonable costs for everything except  
2     heart disease -- you know, congestive heart  
3     failure and ESRD. Congestive heart failure and  
4     renal dialysis -- no, the -- the treatments that  
5     are needed for congestive heart failure and the  
6     treatment that is needed for ESRD.

7             And you can say, well, does that  
8     differentiate or doesn't it differentiate? I  
9     mean, I would say, in that -- in that situation,  
10    it probably doesn't differentiate, but the  
11    salient point, to your question and Justice  
12    Alito's question, is that they have the same  
13    problem in their reading of the statute.

14            In their reading of the statute, they  
15    say, well, look, you can forget the last 18  
16    words of the statute. All you have to know is  
17    whether it differentiates on the basis of people  
18    who have ESRD. So what if the statute -- what  
19    if the plan said, okay, people who have ESRD and  
20    people who have congestive heart failure or  
21    people who have cancer get a lower level. It's  
22    the same comparator probably.

23            JUSTICE BREYER: No, it isn't. The --  
24    the -- look, what they're saying, I think now, I  
25    -- I hope, because I've had a hard time with

1     this, okay, I think they're saying imagine -- or  
2     at least this is close -- there are 5,000  
3     members of a plan. They each have a piece of  
4     paper which describes the whole plan. In this  
5     piece of paper, it says ESRD outpatient and it  
6     is identical whether you have the disease,  
7     whether you don't have the disease, you might  
8     get the disease, maybe you had it and it wasn't  
9     paid for, but anybody who has it or gets it or  
10    whatever it is will be paid identically. That's  
11    the end of the case.

12                 MR. WAXMAN: Yeah, I agree.

13                 JUSTICE BREYER: What you are saying  
14    --

15                 MR. WAXMAN: That's their position.

16                 JUSTICE BREYER: Good. At least I've  
17    got that right.

18                 But then what you are saying, it seems  
19    to me, is we look at that piece of paper and we  
20    see everybody is getting the same. Bah, people  
21    with heart conditions, something different.  
22    People with colds, something different.  
23    In-patient people where you add to the bill,  
24    normally, about \$2,000 a day for hospital  
25    overhead, are paid something different.

1                   And, lo and behold, that's what you  
2                   want us to look at. And what the hell is if  
3                   that's so, what goes off in my head is you are  
4                   substituting for people who make decisions as to  
5                   costs, several thousand judges who know far less  
6                   about it --

7                   MR. WAXMAN: I --

8                   JUSTICE BREYER: -- than HHS, than --  
9                   than anyone else in the medical world. And --  
10                  and then it covers all the diseases and it seems  
11                  to me nightmare. Now, that's what I'm worried  
12                  about.

13                  MR. WAXMAN: Okay.

14                  JUSTICE BREYER: And I ask it so I can  
15                  see your answer.

16                  MR. WAXMAN: And this is -- in no way  
17                  does applying this statute as we read it, and I  
18                  do want to -- I -- I want to continue on the  
19                  comparator issue, because I -- I gather that's  
20                  something that you also are concerned about, but  
21                  I do want to go back and underscore why their  
22                  reading of the statute renders exactly one-half  
23                  of the words of this statute complete surplusage  
24                  and renders this statute utterly toothless  
25                  because --

1 JUSTICE BREYER: Now, I'm not  
2 interested at the moment --

3 MR. WAXMAN: I -- I --

4 JUSTICE BREYER: -- in the toothless.

5 MR. WAXMAN: I understand. The point  
6 --

7 JUSTICE BREYER: I'm interested in the  
8 chaotic.

9 MR. WAXMAN: The point about the  
10 comparator is in a case like this where we  
11 allege -- and our complaint was dismissed --  
12 that -- that out -- that renal dialysis and  
13 outpatient renal dialysis are treated uniquely  
14 disadvantageously, and --

15 JUSTICE BREYER: Compared to?

16 MR. WAXMAN: Compared to any other  
17 treatment.

18 JUSTICE BREYER: All right. Does it  
19 compare -- does -- are you going to introduce  
20 evidence, whether it's this one, compared to  
21 heart attack patients?

22 MR. WAXMAN: Yeah, absolutely.  
23 There's not -- there's not going to be --

24 JUSTICE BREYER: Then how do you --

25 MR. WAXMAN: -- any dispute about



1     this.

2                   JUSTICE BREYER:  -- avoid, if not this  
3     case, in the mine-run of cases, of people  
4     bringing non-stop cases where the judge as to  
5     look at heart attacks, in-patient diagnostic  
6     facilities -- you know, we could go on for about  
7     ten months listing all the other things.

8                   MR. WAXMAN:  Justice Breyer, I would  
9     do it in any number -- the first way I would do  
10    it is to say is this an -- does the allegation  
11    here represent a differentiation of ESRD  
12    patients on the basis of their need for renal  
13    dialysis?

14                   There are a lot of other provisions  
15    that aren't.  Now, is there a differentiation?  
16    If -- if there are various costs associated with  
17    various treatments, you don't need -- the  
18    complaint doesn't even satisfy the Twombly  
19    standard, but my ultimate point is that it  
20    doesn't matter whether you're focusing on, well,  
21    what about this treatment or what about that  
22    treatment?

23                   They have the same problem if you're  
24    saying for people with ESRD or people with  
25    diabetes or people with congestive heart

1 failure, you get X, but for people who have, you  
2 know, hearing loss, you get Y. It's the same --  
3 you can't avoid a comparator problem.

4 The problem is resolved by --

5 JUSTICE GORSUCH: Mr. Waxman, if -- if  
6 -- if -- if -- if Justice Breyer is correct and  
7 -- and we have a comparator problem, as you call  
8 it, I -- I think you indicated earlier that you  
9 -- you think it would be solved from -- from the  
10 hospital's perspective, if they had given  
11 similarly limited benefits for congestive heart  
12 failure, then -- then they would win.

13 MR. WAXMAN: Right, we -- in that  
14 instance --

15 JUSTICE GORSUCH: Right?

16 MR. WAXMAN: Yes. In that instance we  
17 would have to show that the addition of  
18 congestive heart failure, which I think would be  
19 hard, but let's say they say, you know, you get  
20 the same thing for sleep apnea, the same  
21 disadvantageous treatment, the burden would be  
22 on us if there were -- if there were dis- -- if  
23 there were disadvan- -- disadvantageous  
24 treatment of a host of medical treatments.

25 The burden would be on us to plausibly

1     allege and then prove that those were, in  
2     essence, a sham.

3             JUSTICE GORSUCH:   Okay.   And what --  
4     what -- what -- what incentive structure does  
5     that create if -- might that encourage health  
6     plans to provide more parsimonious limits for  
7     other similar chronic diseases?

8             MR. WAXMAN:   So I think not.   And I'll  
9     say one reason is historical and the other is  
10    logical, and -- and I suppose political with a  
11    small "p."

12            These plans have been -- this  
13    anti-differentiation provision has been around  
14    for 31 years.   This is -- this and the plan in  
15    -- in Amy's Kitchen and a few other ones are  
16    utterly --

17            JUSTICE GORSUCH:   Well, both sides can  
18    talk about the -- the fact that the history is  
19    on their side.   And -- and I'm asking you to put  
20    that aside for the moment.

21            MR. WAXMAN:   Okay.   So --

22            JUSTICE GORSUCH:   You -- you --

23            MR. WAXMAN:   -- putting that aside --

24            JUSTICE GORSUCH:   -- indicated that if  
25    a plan could show that it was equally

1 parsimonious with respect to congestive heart  
2 failure it would -- it would prevail.

3 I -- I would think that would be a  
4 suggestion to plans that that's exactly what  
5 they should do and should we worry about that?

6 MR. WAXMAN: You know, I -- I really  
7 think you don't need to worry about this, not  
8 only for historical reasons, but also because it  
9 is only ES -- ESRD patients who are immediately  
10 eligible after three months, regardless of age,  
11 for Medicare. And --

12 JUSTICE GORSUCH: And that -- that  
13 raises another question I had, actually. And --  
14 and that is, you know, I understand an  
15 anti-discrimination law to protect patients, but  
16 I'm -- I'm not familiar with one that this Court  
17 has encountered before with -- that would only  
18 protect the public fisc.

19 MR. WAXMAN: Well, there's no -- there  
20 is -- there's no doubt that one of the two  
21 objectives of this statute was, in fact, to  
22 protect the public fisc to avoid payors paying  
23 secondary to Medicare as soon as the patient is  
24 enrolled.

25 So whether you call this a

1     differentiation statute or a discrimination  
2     statute, everybody agrees that was one of  
3     Congress's objectives.

4                 Congress -- and this is clear from the  
5     fact that the anti-discrimination provision was  
6     enacted at the same time that the secondary --

7                 JUSTICE GORSUCH:  But -- but we'd  
8     agree, I think, wouldn't we, that -- that the  
9     only thing that, the outcome of this case, is  
10    how soon Medicare will wind up paying for these  
11    services?  Is that --

12                MR. WAXMAN:  That's right.  And -- and  
13    Congress was very well aware, and it is  
14    explicated in several of the amicus briefs,  
15    Congress has been expressly aware that the only  
16    way that an -- an outpatient dialysis system in  
17    this country of private medicine can survive is  
18    if the 10 percent of dialysis treatments that  
19    aren't covered by Medicare are the result of a  
20    negotiation between the providers --

21                JUSTICE GORSUCH:  If the beneficiary  
22    of the civil --

23                MR. WAXMAN:  -- and the plans.

24                JUSTICE GORSUCH:  If the beneficiary  
25    of the anti-discrimination principle is supposed

1 to be the public fisc then, what should we make  
2 of the fact that the government is on the other  
3 side of the V in this case, I mean I think  
4 you've -- if they're the beneficiary of the  
5 discrimination principle that you are asking us  
6 to adopt?

7 MR. WAXMAN: So they aren't the  
8 beneficiary. They are one of the two  
9 beneficiaries. And I will address the second  
10 later.

11 JUSTICE GORSUCH: Well, we agree that  
12 the patient is going to receive the services  
13 under Medicare, right, it's just a matter of who  
14 pays and -- and -- and when?

15 MR. WAXMAN: The -- let me first  
16 address the perplexing question of why the  
17 government is on the other side.

18 JUSTICE GORSUCH: I mean, but why  
19 don't you answer that question first.

20 MR. WAXMAN: Oh, okay.

21 JUSTICE GORSUCH: We agree that the  
22 only question is who pays and when, right?

23 MR. WAXMAN: The only question is who  
24 pays and when and --

25 JUSTICE GORSUCH: Okay.

1 MR. WAXMAN: -- how much -- excuse me.

2 JUSTICE GORSUCH: And how much your  
3 company gets. I get that.

4 MR. WAXMAN: No, no --

5 JUSTICE GORSUCH: I get that. If you  
6 can --

7 MR. WAXMAN: -- no, I'm sorry, with  
8 respect.

9 JUSTICE GORSUCH: Counsel, please.  
10 Okay. If it is who benefits, if the only  
11 question is who pays and when, the beneficiary  
12 is government's fisc, why -- why shouldn't we  
13 take account of the fact that the government is  
14 on the other side of the V; how do we -- how do  
15 we handle that?

16 MR. WAXMAN: Well, I think Mr.  
17 Guarnieri has told you in his argument that the  
18 government is on the other side because it -- it  
19 -- it feels some duty to defend one particular  
20 sub-provision of its regulations which, as our  
21 briefs explain, is inconsistent with both the  
22 statute and the provision that immediately  
23 precedes it.

24 He has said in his brief and today  
25 here that the government is quite troubled by

1     what this plan is trying to do and it  
2     acknowledges that there very likely will be an  
3     adverse financial effect on the Medicare fisc if  
4     the Court reverses and adopts the -- the reading  
5     of the statute that -- that Judge Murphy  
6     provided in dissent below.

7                 But here -- here is -- and I -- I -- I  
8     apologize if I was wrangling with you, but I was  
9     objecting to your suggestion, which I know you  
10    don't mean but I had heard it mistakenly, that  
11    the only people who are harmed here are possibly  
12    the Medicare fisc and my company or the  
13    companies.

14                The harm here -- and this is -- this  
15    is probably laid out as well as anywhere by the  
16    amicus brief of the dialysis patients coalition,  
17    which is three -- 30,000 dialysis ESRD  
18    sufferers, who explain all the ways in which the  
19    provisions of this plan harm people.

20                Now, it -- you can say that, you know,  
21    this is just a payment dispute, but it's not.  
22    The core benefit that these plans provide is  
23    payment for medical services.

24                And there's real harm, Number 1, that  
25    in -- there is no uniquely, for this service,



1       there is no in-network available.

2               So there is no provider who has agreed  
3       not to balance bill and who has guaranteed that  
4       you can get treatment. It requires higher  
5       co-pays and deductibles, up to \$7,000 a year.  
6       It doesn't provide any relief whatsoever for the  
7       first three months in which there is no Medicare  
8       backstop.

9               And you can say: Oh, well, this is  
10       the Medicare Secondary Payer Act, you can always  
11       enroll in Medicare secondary. The government  
12       says that's an extra \$170 a month, which is, by  
13       the way, the minimum. It is certainly not  
14       applicable to everybody.

15              You pay Medicare \$170 a month, or \$250  
16       a month, if you can get the secondary coverage.  
17       This is in addition to what these people of  
18       limited means and who are facing end-of-life  
19       worries are already paying to the group health  
20       plan.

21              And if they can't reasonably afford to  
22       pay two sets of benefits, they do what Patient A  
23       did in this case -- -

24              JUSTICE ALITO: Mr. Waxman --

25              MR. WAXMAN: -- which is --

1 JUSTICE ALITO: -- isn't it true that  
2 your company and another company control around  
3 89 percent of the market for dialysis?

4 MR. WAXMAN: I don't know the numbers,  
5 but they -- they -- there are essentially two  
6 large players and then several other players.  
7 And the reason that that exists, nobody -- I  
8 mean, there's -- to my knowledge, there's never  
9 been an antitrust complaint filed against these  
10 companies.

11 And if Marietta Memorial or MedBen had  
12 some claim that they were, you know, refusing to  
13 negotiate in good faith or agree to a reasonable  
14 price, there were plenty of causes of action.

15 The reason that it exists, and I think  
16 my friends on the other side agree, is because  
17 Congress has chosen to -- for purposes of  
18 Medicare or Medicare CMS has chosen, to  
19 reimburse plan -- the centers at less than the  
20 actual cost of providing the service with the  
21 understanding that in a few instances, that is,  
22 the 10 percent of people who get outpatient  
23 dialysis, they operate under negotiated  
24 in-network plans with the providers.

25 JUSTICE ALITO: Well, the statistic I

1 have is that your average cost per treatment is  
2 \$269 and you charge on average \$1,041. Is that  
3 right?

4 MR. WAXMAN: Well, it is \$290, as --  
5 as we explain in our brief, and the average  
6 price that we charge is \$1,000. I mean, this is  
7 well, well -- this has been well-known to  
8 Congress for over 30 years.

9 This is how CMS has chosen to allow  
10 the dialysis industry to stay in business. If  
11 what happens is that you reverse, and plan --  
12 plans widely can do what this plan has done,  
13 there -- there are going to be hundreds or  
14 thousands of dialysis centers --

15 JUSTICE GORSUCH: Mr. Waxman, I  
16 understand -- I understand you're -- you're  
17 attacking the -- the low rates this group plan  
18 provides for dialysis, and -- and one -- one --  
19 one -- one can make strong arguments about that.

20 But even if -- even if a group plan  
21 agreed to reimburse at 200 percent of Medicare  
22 rates, you know, \$500, you'd -- you'd still --  
23 your companies would still reserve the right to  
24 balance bill for the other \$500, say, right?

25 MR. WAXMAN: Yes. In other words, our

1 -- the -- the -- the -- the differentiation  
2 here, Justice Gorsuch, is not -- doesn't depend  
3 on the fact that they pay 87 and a half percent  
4 of the already low Medicare rate.

5 JUSTICE GORSUCH: So, really, the --

6 MR. WAXMAN: It's --

7 JUSTICE GORSUCH: The scope of their  
8 payment plan isn't relevant to your argument.

9 MR. WAXMAN: The scope of their  
10 payment plan is --

11 JUSTICE GORSUCH: You'd still reserve  
12 --

13 MR. WAXMAN: -- our argument. And it  
14 is this --

15 JUSTICE GORSUCH: You'd still reserve  
16 the right to balance-bill for whatever  
17 difference there were, right?

18 MR. WAXMAN: We would still reserve  
19 the right to balance-bill. And as counsel has  
20 pointed out, we don't cut off life-saving  
21 treatment because people can't pay the  
22 difference. We don't, in fact, balance-bill --  
23 people who come to our centers sign an agreement  
24 saying they're responsible for the balance. But  
25 people who can't afford it don't get billed.

1                   So the question is not a loss of  
2                   coverage unless the interpretation that Judge  
3                   Murphy in dissent provided becomes the law of  
4                   the land, in which case there aren't going to be  
5                   for-profit dialysis centers in many, many, many  
6                   communities in the United States. It is already  
7                   only the ones that can be the most ruthlessly  
8                   efficient and have economies of scale that even  
9                   operate. That's why there are two predominant  
10                  companies here.

11                  I mean, if I can just --

12                  JUSTICE SOTOMAYOR: Counsel, just --

13                  MR. WAXMAN: -- go to why --

14                  JUSTICE SOTOMAYOR: Just one question  
15                  in what you just said about this. Are you --  
16                  how do -- how do you decide who can afford this  
17                  treatment? I'm sure there are plenty of people  
18                  with means who come in and say I can't afford  
19                  it. Do you just accept their word?

20                  MR. WAXMAN: I mean, I --

21                  JUSTICE SOTOMAYOR: So are you really  
22                  accepting whatever people are willing to pay?

23                  MR. WAXMAN: Justice Sotomayor, I --  
24                  you know, this -- these are actually facts not  
25                  in the record, and they're actually facts I

1 don't know the answer to. So, you know, this --

2 JUSTICE SOTOMAYOR: I'm -- I'm just  
3 curious.

4 MR. WAXMAN: But I -- I --

5 JUSTICE SOTOMAYOR: I do see -- I do  
6 see your argument, however, that if every other  
7 provider does this and is paying just whatever  
8 the average cost might be because they're  
9 charging 125 percent of Medicare -- paying 125  
10 of Medicaid, that for many providers, if it's  
11 uniform now that nobody is going to pay much,  
12 that many of the providers just have to go out  
13 of business, correct?

14 MR. WAXMAN: There's no question --

15 JUSTICE SOTOMAYOR: That's your point?

16 MR. WAXMAN: There's -- there's no  
17 question about that. I mean, if you look, for  
18 example, not only at the -- the Kidney Care  
19 Partners' amicus brief but also the brief of  
20 former CMS Administrator Scully, he explains why  
21 that's the case.

22 Now, I -- I do want to go, just before  
23 my time runs out, whenever that will be, to  
24 explain because there are a lot of questions  
25 asked of my friends about the text. And I -- I

1 -- I fully endorse the "questions" or -- or  
2 reading of the statute that Justice Kagan  
3 provided, but I think it's unimportant --

4 JUSTICE SOTOMAYOR: You're off on  
5 another -- not my question, correct?

6 MR. WAXMAN: Oh, I'm sorry, I --

7 JUSTICE SOTOMAYOR: Are you finished  
8 answering --

9 MR. WAXMAN: -- I answered your  
10 question, which is --

11 JUSTICE SOTOMAYOR: Okay. No, you're  
12 somewhere --

13 MR. WAXMAN: -- I don't know the  
14 facts. There -- there is simply no -- under  
15 their reading of the statute, which is you just  
16 look and see whether it calls out ESRD and if it  
17 provides the same benefits, whatever they are,  
18 you know, in-grown toenails and whatever, to  
19 ESRD patients as to other, the statute ends.  
20 You don't even -- even need to read the last 18  
21 words of a 36-word provision.

22 Neither the Petitioners nor the United  
23 States has given any content, yet to explain  
24 what content there can be if -- to the -- to the  
25 rest of it, if the first one simply means if you

1 discriminate against ESRD patients by name,  
2 that's illegal. And if you don't, that's not  
3 illegal.

4 And what this -- but what this  
5 provision says -- and I think here, you know,  
6 it's really important, in their reply brief, the  
7 Petitioner says, look, what they wanted was  
8 parity. They wanted parity between ESRD  
9 patients. They wanted them to have the same  
10 benefits, whether you have ESRD or not.

11 The text completely refutes that.  
12 First of all, a few lines above is the provision  
13 about -- that deals with people over 65. And it  
14 says, number one, you can't take into account  
15 the fact that they're eligible for Medicare,  
16 which is the same as the "take into account"  
17 provision here.

18 And, second, it says, you must provide  
19 -- they shall -- people over 65 shall be  
20 entitled to the same benefits under the same  
21 conditions as any other individual under age 65.  
22 That's not what this provision -- what our  
23 provision says.

24 What our provision says is you can't  
25 differentiate on the benefits you provide



1     between individuals having ESRD and other  
2     individuals covered by the plan on the basis of  
3     -- and then it explains what it means to  
4     differentiate -- on the basis of express. You  
5     can't do it, you can't call it out by name.

6             There is a statutory proxy. You may  
7     not do it on the basis of the need for renal  
8     dialysis, and you may not do it in any other  
9     manner that serves as a proxy for what ESRD  
10    patients uniquely need.

11            That reading of the statute, Justice  
12    Kagan's reading of the statute, gives meaning to  
13    every word of the statute. The government's  
14    reading or the Petitioners' reading gives no  
15    meaning whatsoever. The one example the  
16    government was able to come up with in its  
17    brief, which is, well, some plans may give  
18    greater benefits based on tenure and people with  
19    ESRD may be older, fails because a plan that  
20    gives higher benefits based on tenure doesn't  
21    even meet their test for the first part of the  
22    clause.

23            It's not differentiating on the basis  
24    of ESRD. I mean, the anomaly in this case --  
25    and I would be interested in MedBen's lawyer

1 response to this is, as we allege in the  
2 complaint, MedBen, which is the plan  
3 administrator and this little consulting firm  
4 that has come up with the language that was  
5 imposed by this plan, its -- it expressly touts  
6 the benefit of its ability to "reduce dialysis  
7 procedures provided to ESRD patients" by  
8 implementing our proprietary dialysis health  
9 plan language.

10 And in this case, it is here trying to  
11 deny that that is what its plan does.

12 CHIEF JUSTICE ROBERTS: Justice  
13 Thomas, anything further?

14 Justice Breyer? Anything?

15 Justice Sotomayor?

16 Justice Kagan?

17 Justice Barrett?

18 Thank you, counsel.

19 MR. WAXMAN: Thank you very much, Your  
20 Honor.

21 CHIEF JUSTICE ROBERTS: Rebuttal, Mr.  
22 Kulewicz.

23 REBUTTAL ARGUMENT OF JOHN J. KULEWICZ  
24 ON BEHALF OF THE PETITIONERS

25 MR. KULEWICZ: Thank you, Mr. Chief

1 Justice. Four brief points, please.

2 First in response -- in further  
3 response to Justice Alito's question about the  
4 network, it does, of course, take two to  
5 network. DaVita never tells you or never says  
6 either in the record or even up to today that it  
7 wants to come into the network. What it seeks  
8 is the right to be paid at its undiscounted  
9 charges.

10 That would destroy any incentive to  
11 come into network. It would have, obviously,  
12 the catastrophic effect upon patients in the  
13 plans that we've discussed.

14 Justice Breyer, in response to your  
15 ongoing search for a comparator, we -- we still  
16 have not heard one. We don't have a comparator  
17 in the brief of the Respondents. We have not  
18 heard one today. What -- what comparator? If  
19 we say that there is disparate impact and it  
20 should be equal, the question is equal to what?  
21 We haven't seen it in the briefs. We still  
22 don't see it today.

23 My -- my friend indicated that -- that  
24 the -- this cost containment measure of the plan  
25 is unique to the plan. But if the Court would

1 look at any -- from pages -- pages 52 through 92  
2 of the joint appendix alone, there are ten other  
3 examples in there, including five other  
4 out-of-network situations that the plan  
5 addresses, one other reference-based price that  
6 the plan uses, and four extraordinarily costly  
7 surgical centers that are -- that are completely  
8 excluded from the plan.

9           These don't have anything to do with  
10 dialysis, but the point that I want to make is  
11 that dialysis is not the only situation that is  
12 a cost-containment function here.

13           And then, finally, in -- in response  
14 to Justice Sotomayor's question about what would  
15 happen to -- to plans, plans of course -- I'm  
16 sorry, what would happen -- what would happen to  
17 providers, the providers, of course, have gone  
18 to Congress before to get an increase in the  
19 Medicare rate. They are still able to do that.

20           And if the Court were to reverse, as  
21 we are asking in this case, and enter final  
22 judgment in favor of Petitioners on all claims,  
23 perhaps that will give Respondents the incentive  
24 to negotiate a network rate that is fair and  
25 reasonable.

1 Thank you, Your Honor.

2 CHIEF JUSTICE ROBERTS: Thank you,  
3 counsel.

4 Thank you, Mr. Guarnieri.

5 The case is submitted.

6 (Whereupon, at 1:06 p.m., the case was  
7 submitted.)

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## Official - Subject to Final Review

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